
Southern Union Company

D.T.E. 04-75

BRIEF OF SOUTHERN UNION COMPANY

Submitted by:

Cheryl M. Kimball, Esq.
Keegan, Werlin & Pabian, LLP
265 Franklin Street
Boston, MA, 02110
(617) 951-1400

Dated: August 24, 2004

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Southern Union Company

)
)
)
D.T.E. 04-75

POST-HEARING COMMENTS OF SOUTHERN UNION COMPANY

I. INTRODUCTION

On August 4, 2004, Southern Union Company ("Southern Union" or the "Company") filed a petition with the Department of Telecommunications and Energy (the "Department") pursuant to G.L. c. 164, § 17A for approval and authorization to invest up to \$700 million in CCE Holdings, LLC ("CCE"), which is a joint venture between Southern Union and an equity partner, GE Commercial Finance Energy Financial Services ("GE Energy Finance").¹

The Department docketed the filing as D.T.E. 04-75. Pursuant to notice duly issued, the Department conducted public and evidentiary hearings at its offices on August 20, 2004. There are no intervenors in this proceeding. In support of the petition, the Company offered the testimony of David J. Kvapil, Executive Vice President and Chief Financial Officer for Southern Union and Robert Michael Kerrigan, III, Corporate Counsel and Assistant Secretary for Southern Union. The evidentiary record consists of 23 exhibits and two responses to record requests. On August 24, 2004, the Company submitted a brief in support of its petition.

¹ On September 28, 2000, Southern Union, a Delaware corporation, acquired North Attleboro Gas Company and Fall River Gas Company, which now operate in Massachusetts subject to the Department's jurisdiction under G.L.c. 164, § 1, under a d/b/a name "New England Gas Company".

As discussed below, the record in this proceeding shows that the Company's proposal meets the Department's public-interest standard under G.L. c. 164, § 17A because the transaction will produce significant value for both customers and shareholders in terms of improving the overall financial position of the Company and creating the opportunity for the realization of financial and operational efficiencies. Accordingly, the Department should approve the Company's request for authorization and approval to invest up to \$700 million in CCE.

II. DESCRIPTION OF THE COMPANY'S PROPOSAL

Southern Union seeks approval and authorization, pursuant to G.L. c. 164, § 17A, to invest up to \$700 million in CCE, a joint venture between Southern Union and an equity partner, GE Energy Finance. On June 24, 2004, CCE entered into a Purchase Agreement ("Agreement") with Enron Corp. and its affiliates (collectively, "Enron") to acquire 100 percent of the equity interests of CrossCountry Energy LLC ("CrossCountry"). On that same date, the United States Bankruptcy Court for the Southern District of New York (the "Court") issued an order (the "Order") granting "Stalking Horse" status to the Agreement and setting forth certain bid procedures for a Court-mandated auction scheduled to take place at 10:00 a.m. (EST)/9:00 a.m. (CST) on September 1, 2004.

CrossCountry is a holding company headquartered in Houston, Texas that employs approximately 1,100 people and owns interests in and operates Transwestern Pipeline Company ("Transwestern"), Citrus Corp. and Northern Plains Natural Gas

Company.² In total, the interstate distribution system that is owned and operated by CrossCountry is comprised of approximately 9,700 miles of pipeline and approximately 8.5 Bcf/day of natural gas capacity and serving customers in four major geographical regions in 18 states.

Under the terms of Limited Liability Company Agreement (Exhibit DTE-1-01 [confidential]), Southern Union will enter into an arrangement with GE Energy Finance, to acquire a 50 percent equity interest in CCE, which will purchase 100 percent of the equity interests of CrossCountry. To fund the transaction, Southern Union will invest up to \$700 million in CCE. (Exhibit DTE-1-15). Southern Union will undertake an equity issuance to raise all or part of the capital needed to fund its portion of the investment (Exhibit SU-1, at 9; Tr. at 12).³ The remainder of the purchase price will be funded through a combination of: (1) investment by GE Energy Finance; (2) the assumption of existing debt currently held by Transwestern totaling approximately \$461 million (Exhibit SU-2; at 1; Tr. at 9); and (3) a debt issuance at the CrossCountry holding company level (Tr. at 12).

For Southern Union, both the \$461 million in existing debt that will be assumed through the transaction and any new debt to be issued by CCE or any subsidiary thereof will be non-recourse debt. This means that the debt will be neither guaranteed by Southern Union, nor can the debt accrue to Southern Union or its utility operations in the event of a default (Exhibit SU-1, at 10; Exhibit DTE-1-13; Tr. at 10). In particular, none

² Transwestern, Citrus Corp. and Northern Plains Natural Gas Company each operate as a "natural gas company" as defined in Section 2 of the Natural Gas Act (15 U.S.C. § 717) and each are subject to all rules and regulations promulgated by the Federal Energy Regulatory Commission.

³ Southern Union will submit a petition for approval of the financing arrangements no later than August 27, 2004.

of Southern Union's assets, including its local gas distribution assets may be attached by CCE (or Transwestern) debt holders to satisfy the debt obligations in the event that there is a default on the debt instruments (*id.*). Moreover, none of Southern Union's utility assets or operations will be used to provide security to the CCE and Transwestern lenders (*id.*). Approval for Southern Union to invest funds in CCE prior to September 1, 2004 is necessary for CCE to compete on a level playing field with other potential bidders in the Court-mandated auction process.

III. STANDARD OF REVIEW

G.L. c. 164, § 17A provides, in relevant part:

No gas or electric company shall, except in accordance with such rules and regulations as the [D]epartment shall from time to time prescribe, loan its funds to, guarantee or endorse the indebtedness of, or invest its funds in the stocks, bonds, certificates of participation or other securities of any corporation, association or trust unless said loan guaranty or endorsement, or investment is approved in writing by the [D]epartment.

G.L. c. 164, § 17A.

In Bay State Gas Company, D.P.U. 19886 (1979), the Department noted that no explicit standard of review is provided by § 17A, or in judicial or administrative construction of the statute. The Department, however, has recognized that the primary purpose of § 17A is to protect the ratepayers by assuring a utility's stable financial condition.⁴ In D.P.U. 19886, the Department also noted that "in keeping with the Supreme Judicial Court's interpretation of G.L. c. 164, § 14, we believe that implicit in the statutory framework in which § 17A is found is that a proposed investment must be consistent with the public interest."

⁴ Commonwealth of Mass., Dept. of Pub. Util., Recommendations of the Department of Public Utilities to the General Court at 2, House Doc. No. 53 (1954); see also E. Gadsby, 1 Annual Survey of Massachusetts Law at 182 (1954).

In Boston Edison Company, D.P.U. 850 (1983), the Department further defined the parameters of a § 17A proposal, which is “consistent with the public interest:”

The General Court did not, in our view, intend that proposals be held “inconsistent” with the public interest merely because a fair assessment of the relevant factors recognizes that both beneficial and negative aspects may attend those proposals. Consequently, even if a particular proposal has negative aspects, we will find that such a proposal is consistent with the public interest if, upon consideration of all its significant aspects viewed as a whole, the public interest is at least as well served by approval of the proposal as by its denial.

In Bay State Gas Company, D.P.U. 91-165 (1992), the Department reaffirmed the standard of review articulated in D.P.U. 850, that proposals filed under § 17A must be consistent with the public interest, and that they meet this standard if, upon consideration of all of the significant aspects of a proposal, the public is at least as well served by approval of the proposal as by its denial. In D.P.U. 91-165, at 7, the Department further noted that the application of the consistency standard in a § 17A case is based on the totality of what can be achieved by the proposal rather than a determination of any single gain which might be derived from the proposed transactions.

The Department also found that the consistency standard best accommodates the Department’s interest in protecting the utility’s ratepayers from the adverse effects of unwarranted § 17A transactions and a utility’s interest in having flexibility in a changing marketplace to meet long-term objectives of its ratepayers and shareholders. D.P.U. 91-165, at 7. In D.P.U. 91-165, the Department articulated some of the factors that should be considered in evaluating § 17A petitions. These include: the nature and complexity of the proposal, the relationship of the parties involved in the underlying transaction, the use of the funds associated with the proposal, the risks and uncertainties associated with the proposal, the extent of the regulatory oversight on the parties involved

in the underlying transaction, and the existence of safeguards to ensure the financial stability of the utility. After consideration of such a petition, viewed as a whole in light of the described factors, the Department may approve a § 17A investment if it finds the investment is consistent with the public interest.

After consideration of such a petition, viewed as a whole in light of the described factors, the Department may approve a § 17A investment if its finds the investment is consistent with the public interest.

IV. THE COMPANY'S PROPOSAL MEETS AND EXCEEDS THE DEPARTMENT'S STANDARD OF REVIEW UNDER G.L. c. 164, § 17A.

The Department's review of an investment considers the overall anticipated effect on ratepayers of the potential benefits and harms of the proposal and may include consideration of a number of factors including, but not limited to: the nature and complexity of the proposal; the relationship of the parties involved in the underlying transaction; the use of funds associated with the proposal; the risks and uncertainties associated with the proposal; the extent of regulatory oversight on the parties involved in the underlying transaction and; the existence of safeguards to ensure the financial stability of the utility. Southern Union Company, D.T.E. 03-3, at 14 (2003); Massachusetts Electric Company, D.T.E. 01-104, at 4 (2002), citing Bay State Gas Company, D.P.U. 91-165, at 7 (1992); Boston Edison Company, D.P.U. 850 (1983).

With regard to potential benefits to customers, Southern Union claims that by acquiring the equity interests of CrossCountry, and thereby becoming a larger company, the Company will achieve operational efficiencies in providing corporate services to its operating divisions (Tr. at 27). This will result in fixed overhead costs being allocated over a larger operation allowing customers in Massachusetts to benefit in future rate

cases because of lessened corporate overheads (id.). At the same time, the record shows that the acquisition of 100 percent of the equity interests of CrossCountry will have no negative effect on the Company's ability to provide financial and corporate management activities to its local gas distribution companies (Exh. SU-1, at 10-11; Tr. at 28). The Company has sufficient resources so that its local gas distribution companies would not lose access to financial and management resources through the investment in CCE (id.). In addition, the Company will have greater purchasing power, allowing it to obtain larger nationwide discounts to purchase plant, materials and other commodities, with the benefit of the discounts accruing directly to local distribution companies (id.).

With regard to the extent of regulatory oversight on the parties, the operations held by CrossCountry are regulated by FERC (Exh. SU-1, at 4-5). As regulated entities, the companies composing CrossCountry represent a stable investment with very predictable rates of earnings (Exhibit SU-1, at 10-12). Therefore, the use of funds for an investment in CCE is consistent with the public interest as required by s. 17A.

As noted above, the Department has determined that, under G.L. c. 164, § 17A, a petitioner must demonstrate that its proposal is consistent with the public interest and that a petitioner would meet this standard if, upon consideration of all of the significant aspects of a proposal, the public is at least as well served by approval of the proposal as by its denial. See Bay State Gas Company, D.P.U. 91-165 (1992). The Department has further noted that the application of the public-interest standard in a Section 17A case is based on the totality of what can be achieved by the proposal rather than a determination of any single gain (or loss) that might be derived from the proposed transactions. Id.

In this case, the record shows that, after balancing all of the factors involved, the investment will have no negative effect on the service provided, or rates charged, to customers of the New England Gas Company, and therefore, meets the Department's no net harm public-interest standard. Customers will be at least as well served by the Department's approval of the proposed investment as by its denial. Therefore, the Department should grant the Company's request for approval under G.L. c. 164, s. 17A.

V. CONCLUSION

The record in this proceeding shows that the investment of up to approximately \$700 million in CCE for the purpose of acquiring the equity interests of CrossCountry is in the public interest as required by G.L. c. 164, § 17A. Therefore, for the reasons stated above, the Department should:

VOTE: That the investment and related guarantee of up to \$700 million in CCE is in the public interest as required by G.L. c. 164, § 17A.


ORDER: That the investment by Southern Union of up to \$700 million in CCE is approved and authorized;

ORDER: That such other and further orders and approvals are granted as may be necessary or appropriate.

Respectfully submitted,

SOUTHERN UNION COMPANY

By its attorney,



Cheryl M. Kimball, Esq.
Keegan, Werlin & Pabian, LLP
265 Franklin Street
Boston, MA, 02110
(617) 951-1400

Dated: August 24, 2004